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TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice-Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

—VS.—

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF ON BEHALF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AS *AMICUS CURIAE*

Preliminary Statement

Purpose of Reply Brief

Air Line Pilots Association, International submits this reply brief solely because of the somewhat belated filing of a 70-page brief by the Solicitor General on behalf of the United States as *amicus curiae*. In spite of a reluctance to burden the Court with an additional brief Air Line Pilots Association, International has concluded that the novel interpretation of legislative history advanced in the Government's brief should not remain unanswered.

ARGUMENT

The legislative history of the 1958, 1968 and 1972 Acts of Congress supports the position of the appellees.

The brief for the United States is primarily devoted to an examination of the legislative history of the various Acts of Congress establishing federal control of air transportation. The argument is there advanced that Congress manifested an intent to permit local and state governments to enforce curfews as a function of their police powers. The difficulty with the argument is that the exhaustive search of the legislative records made by the Solicitor General establishes the contrary of the proposition which it sets out to demonstrate. Almost every citation of legislative history in the brief for the United States shows that the only exception in favor of curfews intended by Congress was in the case of an airport proprietor as a function of the

proprietor's historic right to limit the use of his own property. Faced with this fact of legislative history the Solicitor General has attempted to turn it to his advantage by a secondary argument to the effect that the distinction between curfew as a function of police power and curfew as a function of proprietorship is not valid. The Solicitor General therefore would have this Court conclude that although Congress addressed itself to proprietorship the legislative history should be deemed amended as if it had been addressed to police power.

An examination of legislative history is a valid method of ascertaining the intent of Congress with respect to a statute. But when legislative history is ascertained it must be respected. It is a novel and dangerous theory of judicial inquiry to assert that one may rewrite legislative history on the basis of what Congress should have been thinking and then bolster the pleaders' conclusion with the rewritten history. Unhappily this seems to be the net effect of the Solicitor General's brief.

At page 32 the Solicitor General refers to a letter from the Department of Transportation to the Senate Committee. The critical portion of the quotation from that letter reads:

> "An action by an *airport proprietor* to exclude aircraft which exceed noise levels established by him does not conflict with the Federal authority to regulate air traffic." (emphasis added)

At page 36 the Solicitor General's brief declares:

> "The Committee then quoted at length from the Secretary's letter, which expressed the view that, while regulation of the flight of aircraft with respect to noise was preempted, 'the proposed legislation

> will not affect the rights of a State or local public agency, as the *proprietor* of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport.' S. Rep. No. 1353, *supra*, p. 6.[27]" (emphasis added)

In footnote 27, following the above quotation, the Solicitor General's brief makes the following acknowledgment:

> "The Department's letters to the House and Senate Committees spoke in terms of the powers of local agencies acting as airport '*proprietors*,' and the court of appeals relied upon this as a basis for distinguishing and holding preempted airport control undertaken through exercise of the police power. For reasons discussed more fully at pp. 44-49, *infra*, we do not believe this to be a valid distinction. Hollywood-Burbank Airport is to our knowledge the only privately owned airport in the country used by airlines operating jet aircraft, and the Department's attention was not focused upon the problems of local regulation of privately owned airports." (emphasis added)

In the face of the numerous, plain and unavoidable references to proprietorship, which appear throughout the legislative history, the Solicitor General is obliged at page 44 of his brief to bring his vessel about on a new tack and to argue that "the proprietary-police power distinction relied upon by the Court of Appeals is not valid". The Solicitor General then goes on to argue, at page 45, that the distinction in question "leads to a logically bizarre result" because "nearly every major airport in the United States is governmentally owned".

This is not to ascertain and respect legislative history as the intent of Congress. To the contrary, this is to question the wisdom and to rewrite the intent of Congress. Perhaps Congress intended to adopt an unwise distinction. That would not alter its intent. It is not within the power of the Solicitor General to reeducate and remotivate the Congress retroactively. It is legitimate to ascertain Congressional intent; it is not legitimate to remake it. The "proprietary-police power distinction" was not an innovation made and relied on by the Court of Appeals. It was created and relied upon by Congress. The Court of Appeals correctly acknowledged and respected the intent of Congress as shown by the legislative history.*

Since it is clear that Burbank is not a proprietor but is in fact in conflict with Lockheed, which is the proprietor of the airport, it must be concluded that the attempted exercise of police power by Burbank is in conflict with a preempted area of federal authority.

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* It should be observed that, viewed correctly, Congress did not act irrationally, nor is the result of the proprietary-police power distinction "bizarre". As stated at page 7 of the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae*, Congress intended to do no more than to respect an ancient "common law right which inheres to the owner and operator of land." For Congress to respect an incident of property ownership is reasonable. What is unreasonable, indeed bizarre, is to argue that to respect such a landlord's right necessarily implies a congressional intention to permit the states and each of the multiple subdivisions surrounding most airports to exercise the police power. So as to avoid any premature conclusion on an otherwise unbriefed point, it should be noted that neither the extent of the airport proprietors' rights nor the extent, if any, of their conflict with Federal regulations, has been adjudicated. The Port Authority of New York and New Jersey regulations, referred to in its answering brief (p. 6), "are expressly subordinate to the FAA rules and do not profess to authorize or direct anything not authorized under the FAA rules, regulations and Tower bulletin". *American Airlines, et al.* v. *Town of Hempstead*, 272 F. Supp. 226, 233-234.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Proof of Service

I, SAMUEL J. COHEN, a member of the Bar of the Supreme Court of the United States, and attorney for Air Line Pilots Association, International, appearing herein, *Amicus Curiae*, hereby certify that on the 9th day of February, 1973, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, counsel for the State of California, *Amicus Curiae*, counsel for the United States, *Amicus Curiae*, counsel for the National Business Aircraft Association, Inc., *Amicus Curiae*, and counsel for The Port Authority of New York and New Jersey, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, first class postage prepaid, to each of the following in this cause (air mail to each counsel a distance of 500 miles or more):

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